NOT INCLUDED IN
BOUND VOLUMES

PMHJMc
Pittsburgh, PA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

POINT PARK UNIVERSITY
Employer

and

Case 06-RC-012276

NEWSPAPER GUILD OF PITTSBURGH/
COMMUNICATIONS WORKERS OF AMERICA
LOCAL 38061, AFL-CIO, CLC
Petitioner

ORDER DENYING MOTION FOR RECONSIDERATION

On February 25, 2015, the National Labor Relations Board issued an Order remanding this proceeding to the Regional Director for further appropriate action consistent with *Pacific Lutheran University*,[1] including reopening the record, if necessary. Thereafter, on March 16, 2015, the Employer filed a Motion for Reconsideration.[2] Having duly considered the matter, we deny the Employer's motion.

The underlying issue in this case is whether the Employer has shown that the faculty members whom the Petitioner seeks to represent are managerial employees, consistent with the Supreme Court's decision in *NLRB* v. *Yeshiva*, 444 U.S. 672 (1980).

On April 27, 2004, the Regional Director issued a Decision and Direction of Election finding that the Employer's faculty are not managers under *Yeshiva*, and directing an election in a unit of the full-time faculty, excluding supervisors,

[1] 361 NLRB No. 157 (2014).
[2] The Petitioner did not file a response to the Employer's motion.

administrators, department chairs, and program directors. The Board denied the Employer's request for review, the Petitioner won the election, and the Employer refused to bargain.

On the Employer's petition for review, the United States Court of Appeals for the District of Columbia Circuit granted review, denied enforcement, and remanded the case to the Board. 457 F.3d 42, 52 (2006). The court faulted the Regional Director for failing to explain which *Yeshiva* factors he primarily relied on and his reasons for doing so. Id. at 50. The court remanded the case to the Board to provide a clear explanation of "which factors are significant and which less so, and why." Id.

The Board accepted the court's remand in 2007 and in turn remanded the proceeding to the Regional Director for further analysis in light of the court's opinion. On July 10, 2007, the Regional Director issued a Supplemental Decision once again finding that the Employer's faculty are not managerial. The Employer filed a request for review.[3]

On December 16, 2014, while the Employer's request for review was still pending, the Board issued its decision in *Pacific Lutheran University*, 361 NLRB No. 157. In *Pacific Lutheran*, the Board acknowledged the criticism of various courts, including the D.C. Circuit in this case, that the Board's analysis for determining whether university faculty are managerial employees failed to provide sufficient guidance as to the factors considered and their relative weight. In response, in *Pacific Lutheran* the Board refined the standard by which it determines the managerial status of faculty

[3] On May 22, 2012, the Board invited interested parties to file briefs addressing eight specific questions. In addition to the Employer and the Petitioner, eight amici curiae filed briefs.

pursuant to *Yeshiva* by developing "a more workable, more predictable analytical framework." Id. slip op at 16. On February 25, 2015, by unpublished Order, the Board remanded this proceeding to the Regional Director "for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary" (the February 25 Order).[4]

On March 16, 2015, the Employer filed the instant motion for reconsideration, requesting that the Board vacate the February 25 Order. The Employer contends that the February 25 Order fails to comply with the court's 2006 mandate and that a remand will prejudice the parties and burden the system with further delays.

First, the Employer contends that the Board has yet to comply with the court's instruction to identify which of the relevant factors set forth in *Yeshiva* are significant and why in its determination that the Employer's faculty are not managerial employees. At stated above, however, in *Pacific Lutheran* the Board specifically identified the analytical framework to be applied when assessing whether faculty are managerial employees. Remanding this case to the Regional Director "for further appropriate action consistent with *Pacific Lutheran University*, including reopening the hearing, if necessary," is consistent with the court's instructions on remand. The court did not mandate any specific procedure for reevaluating the managerial issue or otherwise preclude the Board from remanding the case. See 457 F.3d at 51 ("Had the Regional

[4] The February 25 Order noted that the "only issue on which review was sought and granted was whether the Regional Director had properly reaffirmed his Decision and Direction of Election and concluded that the Employer had not met its burden of affirmatively demonstrating that the petitioned-for full-time faculty are managerial employees within the meaning of *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980)."

Director, or the Board, stated with clarity which factors were significant to the outcome and why, we could have performed our review.").[5]

Second, the Employer argues that the Board should vacate the February 25 Order because resolution of this matter has already been delayed for over a decade, that this excessive delay has prejudiced the parties, and that there is no reason to subject the parties to the additional delay caused by a remand when that course of action "will not assist the Board in complying with the [court's] mandate."

To be sure, there has been considerable and unfortunate delay in this case. But the Employer's assertion that the February 25 Order "will unquestionably further delay the resolution of this matter" is unfounded. Nothing in the February 25 Order suggests that remanding this proceeding to the Regional Director would significantly delay – as opposed to facilitate – resolution of this matter, consistent with due process.

Finally, the Employer argues that it would be "material error" for the Board to apply *Pacific Lutheran* retroactively. Quoting *Pacific Lutheran*, the Employer contends that the Board's presumption in representation cases in favor of applying new rules retroactively is "overcome . . . where retroactivity will have ill effects that outweigh 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" 361 NLRB No. 157, slip op. at 11 fn. 20 (2014) (internal quotations and citations omitted). The Employer argues that the delay resulting from a

[5] For this reason, *Beverly Enterprises* v. *NLRB*, 727 F.2d 591, 592, 593 (6th Cir. 1984), cited by the Employer, is distinguishable. In that case, the court remanded the case to the Board "with *specific instructions* that the Regional Director review the record of the proceedings . . . in order to reconsider inclusion of the [petitioned-for employees] in the bargaining unit, by making *specific findings*" on two questions posed by the court (emphasis in original). The court held that the Board erred by reviewing the record itself (after the court had deemed it ambiguous) and responding to the court's questions, rather than having the Regional Director do so.

remand satisfies this standard. There is no merit in the Employer's argument. As explained above, there is no nonspeculative reason to believe that the February 25 Order will result in significant further delay.[6]

Accordingly, we find that the Employer has failed to establish that reconsideration of the February 25 Order is warranted.

IT IS ORDERED that the Motion for Reconsideration is denied.

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] Members Miscimarra and Johnson adhere to their separate opinions in *Pacific Lutheran University*. Nevertheless, they agree with their colleagues that a remand is appropriate in this case.